

NOTICE: This opinion is subject to formal revision before publication in the Board volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

1199, National Health & Human Service Employees Union, SEIU, AFL-CIO and Staten Island University Hospital. Case 29-CB-10586

August 21, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND ACOSTA

On December 17, 1999, Administrative Law Judge Margaret M. Kern issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed cross-exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and affirms the judge's rulings, findings¹ and conclusions, as set forth in herein, and adopts the recommended Order as modified and set forth in full below.²

At issue in this case is whether the Respondent Union, by its organizer and admitted agent, Fabienne Josephs, unlawfully restrained and coerced employees in the exercise of their Section 7 rights by engaging in a series of open confrontations with managers, supervisors, and security guards employed by Charging Party Staten Island University Hospital. As discussed in full below, at a time when a possible strike was imminent, Josephs subjected the Respondent's agents to deliberate, repeated, and unprovoked verbal abuse, including profanity, racial, and sexual slurs, and threats of physical harm. On two occasions, Josephs attempted to physically push past the Hospital's agents in order to gain access to areas of the

Hospital that had been clearly and lawfully placed off limits to her.

The judge found that Josephs' actions violated Section 8(b)(1)(A) by restraining and coercing employees in the exercise of their right to refrain from supporting the Union. With one exception,³ we agree with the judge's findings. Hospital employees, who were fully aware of Josephs' actions, would reasonably tend to fear that they would be subjected to the same abusive tactics if they failed fully to support the Union in its bargaining position and the impending strike. Indeed, it appears that Josephs' intent was to send this intimidating message to the Hospital employee audience.

Facts

In early 1998,⁴ the Union sought by various means to pressure the League of Voluntary Hospitals, an employer association to which the Hospital belonged, to agree to a new collective-bargaining agreement. Those pressures included a "walk in" at the Hospital's Human Relations Department, informational picketing on June 10, a strike vote conducted from June 15 to 17, a citywide demonstration, and, on June 18, service on the Hospital of written notice that the Union intended to engage in a strike commencing July 1. As part of its strike preparations, the Union notified the Hospital, by letter dated June 11, that it was assigning organizers Fabienne Josephs, Melanie Swann, and Joseph Biasi to its facility. The Hospital agreed to allow the organizers to meet with employees in its cafeteria, but did not agree to give them access to any other areas of the Hospital.

On June 4, Josephs entered the labor and delivery waiting area, ostensibly to pick up a letter signed by some nurses who worked there. She ignored lawful directives from two Hospital security guards that she remain in the cafeteria. The guards were forced to stand shoulder to shoulder at the door leading from the waiting area to prevent Josephs from entering the interior of the labor and delivery department. Josephs made physical contact with one of the guards when she reached past them to push an intercom button. Josephs then berated the guards, in the presence of employees, for blocking her movement, screaming repeatedly, "you can't stop me, I can do anything I want, I can go anywhere I please." Josephs also shouted at one of the guards, "you should go back to Puerto Rico, you little wetback," and called the other guard a "black gorilla walking in a white man's footsteps."

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule and administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We have modified the judge's recommended Order to more closely reflect the violations found. We reject the Charging Party's request that the Board order the Respondent to pay its legal fees. The Board has ordered attorneys' fees awards in cases where a party exhibits bad faith in actions leading to the litigation or in the conduct of the litigation. *Lake Holiday Manor*, 325 NLRB 469 (1998). An award of legal fees is not justified under this standard in the circumstances of this case. For the reasons stated by the judge in her decision, we also conclude that a broad order is not warranted in the circumstances of this case.

³ For the reasons set forth later in this Decision, we reverse the judge's finding that the Union violated Sec. 8(b)(1)(A) by threatening to replace two management officials.

⁴ All dates hereafter are in 1998.

On June 16, Josephs chose to stand outside the cafeteria wearing a T-shirt with a picture of a calendar and the date "July 1" on the front and the words "Contract or Strike" on the back. The Hospital maintained a rule prohibiting the wearing of this T-shirt in the Hospital and there is no contention that this rule was unlawful. As a Hospital security guard approached Josephs, she said "well, I'll take it off," and removed her shirt. Josephs was wearing only a bra underneath. When the guard told her to put the shirt back on, Josephs responded in a loud voice that she could walk around the Hospital naked and the security guard could not stop or touch her, and she could go wherever she wanted in the Hospital.

Josephs then walked towards the emergency room. The guard placed himself in front of the doorway into the emergency room to prevent Josephs from entering and told her that she could not talk to employees in patient care areas and must talk to them in the cafeteria. In reply, Josephs shouted, "Go f—k yourself. I can go wherever I want to go." Josephs next entered the dental area, where 10-20 patients were waiting to be seen. When the guard again told her she was not allowed in patient care areas, she put her hands over her ears and shouted, "I'm not listening to you. I don't care what you're saying. You touch me and I'll kick all your asses."

Josephs then left the dental waiting area and, while returning to the cafeteria, yelled, "La, la, la, la, wherever I want to go you can't stop me." She called a black security guard a "little black gorilla" and an "Uncle Tom," and while passing through the lobby area, said in a loud voice accompanied by sexually suggestive hand gestures, "I should have taken my top off and gotten naked because I know you white boys like black women." Later that same day, a security guard observed Josephs smoking outside the Hospital in a nonsmoking area. When the guard asked her to move to the smoking area, she responded in a loud voice, "Go f—k yourself" and "I'll stick my foot up your ass."

On June 18, Josephs approached the Hospital's executive vice president and chief operating officer, Dr. Andrew Passeri, while he was going through the cafeteria food line. Josephs came within 8 inches of Passeri and screamed at him that he should be ashamed of himself, and that he should wear a bag over his head and move from Tote Hill (an affluent area of Staten Island) to Bay Street, where his employees lived. As Passeri began walking towards the cashier with his tray, Josephs and another individual wearing a union T-shirt repeatedly stepped in front of him without making physical contact but blocking his progress and forcing him to stop walking. After paying for his food, Passeri proceeded to leave the cafeteria.

Josephs followed Passeri out of the cafeteria and the Hospital's security services supervisor, Dawn McMahon, had to interpose her body to prevent Josephs from pursuing him further. Josephs walked into McMahon, making physical contact with her while shouting at the departing Passeri, who was walking down a flight of stairs and could hear Josephs' shouting, that he could be replaced and that he would be replaced. Josephs then put her finger in McMahon's face and told her, "And so can you."

Josephs went back into the cafeteria and McMahon remained at the entrance waiting for the police. Josephs then began to insult McMahon, loudly saying, "Look at you in your nice suit. I know how you got that suit, honey. Do you know why she's wearing pants? To hide the marks on her knees. You must have sucked a lot of dick to get that job." As the organizers began to leave, Josephs continued in a loud voice, "Well, you better check her back, too. I betcha you'll find some scars there. Dawn. Dawn. Dawn. Dawn does Staten Island Hospital." As she descended the stairs, Josephs yelled toward McMahon, "It's amazing you can talk with that mouth as busy as you were to get that job. I know how you got that job and your suit, honey." Then, while walking toward the front door of the hospital, she called McMahon a "bitch" and repeated three times, "Dawn does Staten Island Hospital."

Much of Josephs' most outrageous behavior on June 18 took place in the Hospital cafeteria during the lunch hour, when the largest number of employees were certain to witness it. Employees demonstrated their awareness of Josephs' actions and their concern about those actions by asking McMahon about the incident, and whether she was all right, on a daily basis thereafter. Indeed, many other employees heard about Josephs' intimidating and insulting behavior towards hospital officers and others, and all of the incidents were either directly witnessed by or were disseminated to employees.

Discussion

The interdependent guarantees of Section 7 and Sections 8(a)(1) and 8(b)(1)(A) grant to employees the right to choose for themselves, free of any coercion, whether to support a union or to refrain from supporting a union. This includes, among other things, the right to work in the face of a strike: "The protection afforded by these sections of the Act extends to the right to work."⁵ Even employees who have chosen to support the union, by participating in a strike or picketing, "may be coerced into retaining the status of a striker or even a picket by

⁵ *Woodworkers Local S-426 (W.T. Smith Lumber Co.)*, 116 NLRB 507, 508 (1956), *enfd.* 243 F.2d 745 (5th Cir. 1957) (coercing supervisors and independent contractors who crossed picket line to work).

the threatening and violent conduct of other pickets (especially if these include the officers of the local involved) just as much as may a striking employee.”⁶ A union violates Section 8(b)(1)(A) by engaging in activities that reasonably tend to restrain or coerce employees in the exercise of these protected rights.

The Board has also long recognized that employees may be restrained or coerced in their protected activities by union misconduct directed not against them but against supervisors, managers, and security guards.⁷ Union misconduct of this character coerces employees who witness it or learn of it because they may reasonably conclude that if they do not support the union’s goals, like coercion will be inflicted upon them.⁸

Applying these principles to the facts of this case, we agree with the judge that the Respondent’s harassment of the Hospital’s managers and security guards violated Section 8(b)(1)(A). At the time of this harassment, the Respondent had announced that a strike was imminent, informational picketing had commenced, and a strike vote was conducted. The issue of taking sides in an impending strike must surely have been on employees’ minds. Against this backdrop, the Respondent’s agent, Josephs, embarked on a prolonged campaign of repeated harassment against the Hospital’s supervisors, managers, and security guards. Josephs provoked repeated confrontations with the Hospital’s agents and then deliberately escalated these confrontations by subjecting the Hospital’s managers and guards to extreme and degrading insults. All of this sent a clear message to employees that they would be subjected to the same kind of harassment, and perhaps even reprisal, if they failed to support the planned strike, and that, like the Hospital, they would be powerless to protect themselves.

The coercive impact of Josephs’ actions was heightened because they took place in a hospital setting. The Supreme Court has observed that hospitals are places where

human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day’s activity, and where the patient and his family—irrespective of whether that patient and that family are labor or management oriented—need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed.⁹

Recognizing these concerns, the Board has permitted curbs on far less intrusive union activities than occurred here because of the requirements of effective patient care.¹⁰ Josephs’ intrusions into sensitive patient areas of the hospital, including the labor and delivery waiting area, the dental waiting area, and the corridor leading to the emergency room, as well as other corridors and areas of the hospital accessible to patients, far exceeded the usual behavior in that setting.

In finding that Respondent unlawfully coerced employees by its actions in this case, we are mindful of the latitude we have afforded parties in the manner in which they express their positions, not only recognizing the “industrial realities of speech in a workaday world” but the full freedom necessarily guaranteed them under the Act.¹¹ Thus, the Board carefully distinguishes between statements that reasonably tend to coerce employees, and mere rudeness, which does not.¹² The Board also recognizes the need to distinguish “those cases in which employees have arguably exceeded the bounds of lawful conduct during a strike in a ‘moment of . . . exuberance’ from those cases in which the misconduct is so flagrant or egregious as to require subordination of the employee’s protected rights in order to vindicate the broader interests of society as a whole.”¹³

⁹ *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 783, 784 fn. 12 (1979) (quoting *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 509 (1978) (Blackmun, concurring)).

¹⁰ See, e.g., *Brockton Hospital*, 333 NLRB 1367, 1368 (2001), *enfd.* in pertinent part 294 F.3d 100 (D.C. Cir. 2002), *cert. denied* 123 S.Ct. 850 (2003) (a hospital’s prohibition of solicitation or distribution of literature in immediate patient care areas is presumptively lawful; prohibition of solicitation, during nonworking time, or distribution of literature, during nonworking time and in nonworking areas, is presumptively unlawful).

¹¹ *Longview Furniture*, 100 NLRB 301, 304 (1952), *enfd.* as modified 206 F.2d 274 (4th Cir. 1953) (cursing at employees who crossed picket line).

¹² See *Syn-Tech Windows Systems*, 294 NLRB 791, 792 fn. 2 (1989) (protection of the Act not necessarily lost because grievances presented in a rude manner); *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991), *enfd.* mem. 953 F.2d 1384 (6th Cir. 1992) (rudeness during bargaining not necessarily unprotected).

¹³ *W. C. McQuaide*, 220 NLRB 593, 594 (1975), *enfd.* in pertinent part 552 F.2d 519 (3d Cir. 1977).

⁶ *NLRB v. Woodworkers*, above.

⁷ *Culinary Workers Local 226 (Casino Royale, Inc.)*, 323 NLRB 148, 162 (1997); *Laborers Local 806*, 295 NLRB 941 (1989), *enfd.* mem. 974 F.2d 1343 (9th Cir. 1992) (security guards); *Retail Wholesalers District 65 (I. Posner, Inc.)*, 133 NLRB 1555, 1566 (1961) (managerial employee); *Communications Workers Local 4372 (Ohio Telephone Co.)*, 120 NLRB 684, 686 (1958), *enfd.* as modified 266 F.2d 823 (6th Cir. 1959), *affd.* as modified 362 U.S. 479 (1960) (supervisors); *Woodworkers (W.T. Smith Lumber Co.)*, above (supervisors and independent contractors).

Although security guards are statutory employees, the judge found that they are treated in the same manner as supervisors and other non-employees for the purpose of this 8(b)(1)(A) analysis, citing *Culinary Workers Local 226*, supra, and no party has excepted to this finding.

⁸ *I. Posner*, supra.

Josephs' actions were not limited to mere rudeness and offensive language, but included two attempts by Josephs to physically force her way past the Respondent's security guards into patient care areas of the Hospital. The security guards were required to physically repulse Josephs in order to forestall her entry into these areas. The verbal abuse itself was highly inflammatory and extended over a 2-week period. These actions, then, were not a spontaneous "moment of . . . exuberance." These actions were deliberate and calculated. When coupled with the two physical confrontations described above, Josephs' overall conduct may fairly be characterized as harassment. By her conduct, Josephs sent a message to employees not only about the lengths to which the Respondent would go to punish those with whom it disagreed, but also that the Hospital was "powerless to protect its own legal rights in a confrontation with the Union."¹⁴ Especially in the context of a hospital setting, we conclude that this message was coercive.

We therefore agree with the judge's findings that Josephs' harassment of and deliberate confrontations with the Hospital's management officials and guards violated Section 8(b)(1)(A). However, we reject the judge's finding that Josephs' statement to Passeri and McMahon that they could be replaced was a threat to cause their discharges. Consistent with well-established precedent, we find instead that Josephs' statement was a lawful response to the Hospital's widely circulated memoranda discussing the possibility of using replacement employees, and could not reasonably be viewed by employees as a threat to accomplish the ouster of management officials.¹⁵

Our dissenting colleague does not disagree about what occurred here. She acknowledges that Josephs' actions were offensive and ugly, but nevertheless characterizes them as "ludicrous" "rants and escapades." She takes the position that because Josephs' conduct was not directed at unit employees they had no reason to believe that they would be the subject of Josephs' harassment and threats. We respectfully disagree. Josephs' conduct was not merely ludicrous. It was threatening. Unit employees reasonably could fear that they would be subjected to threats, violence, or similar misconduct if they did not support the Union.

¹⁴ *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991) (nonemployee union agent engaged in objectionable conduct by invading employer's premises immediately before election and repeatedly and belligerently rejecting employer's lawful directives to leave).

¹⁵ *Caterpillar, Inc.*, 321 NLRB 1178, 1179 (1996), vacated pursuant to settlement March 19, 1998, see 332 NLRB 1116 (2000) (employees who wore union T-shirts with slogan "Permanently replace Fites [the employer's chief executive officer]" were engaged in protected, concerted activity).

Our colleague acknowledges that the Board has found that union harassment of nonemployees violated Section 8(b)(1)(A) because it sent a message to employees that they too would be subject to reprisal "if they do not support the labor organization in the activity in which it is engaged."¹⁶ The dissent attempts to distinguish these cases on the grounds that they involved union reprisals against nonemployees in retaliation for their crossing the union's picket line, while the harassment here was directed at the Hospital's security guards and managers in retaliation for their efforts to enforce Hospital rules. We respectfully disagree with our colleague's position.

We agree with the dissent that this case does not involve acts of physical violence. It also does not involve union harassment of nonemployees *on a picket line*. The Act's restriction on restraint and coercion, however, is not limited to actual violence on a picket line, and there is nothing in those cases on which we rely that imply otherwise. Although the link between the union's actions and coercion of employee Section 7 rights may be especially clear during a strike, we find the same link in this case as well.

We also do not agree that the Charging Party should have looked to a state court lawsuit or to the police for assistance, rather than to the Board. We find that Respondent has restrained and coerced employees in the exercise of their Section 7 rights, and recognize the Board's obligation to address the unfair labor practices committed in this case. We also observe that the Respondent did attempt to enlist the aid of the police, but found that they would not respond in a timely manner or take action to effectively prevent Josephs from continuing her repeated acts of intimidation. Had the Respondent successfully obtained the assistance of the police, it might have provoked the filing of unfair labor practice charges by the Respondent and inflamed the situation. In any event, it is well settled that even though a breach of the peace violates the State's criminal statutes, it may still "be noticed by the National Labor Relations Board in performing its statutory function."¹⁷

In sum, we disagree with our colleague's view that Josephs' actions could not reasonably tend to coerce employees' exercise of their Section 7 rights. We conclude that employees of the Hospital could reasonably fear that they would be subjected to similar abusive behavior if they did not submit to the Union's wishes, and therefore we hold that Josephs' conduct violated Section 8(b)(1)(A).

¹⁶ *I. Posner, Inc.*, supra, 133 NLRB at 1566. See also *Casino Royale, Inc.*, supra, *Ohio Consolidated Telephone Co.*, supra, *W.T. Smith Lumber Co.*, supra.

¹⁷ *NLRB v. Woodworkers*, supra at 748.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below, and orders that the Respondent, 1199, National Health & Human Service Employees Union, SEIU, AFL-CIO, Staten Island, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Restraining and coercing employees of Staten Island University Hospital in their right not to join or support any strike, by refusing, in the presence of employees, to comply on request with lawful rules and directions regarding access and conduct on the premises of Staten Island University Hospital, including the following conduct: shouting and cursing that its agents cannot be stopped from entering immediate patient care areas; making racist remarks to individuals; making sexually degrading remarks to individuals; making physical contact with individuals; and removing their clothing and stating that they can walk unclothed around the premises of Staten Island University Hospital.

(b) Threatening to physically assault individuals in the presence of employees.

(c) Blocking individuals' egress within the premises of Staten Island University Hospital in the presence of employees.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at all of its offices and facilities within New York, Brooklyn, Bronx, Queens, and Richmond Counties copies of the attached notice marked "Appendix."¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its offices, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employ-

ees and former employees employed by Staten Island University Hospital at any time since June 4, 1998.

(b) Within 14 days after service by the Region, sign and return to the Regional Director sufficient copies of the notice for posting by Staten Island University Hospital, if willing, at all places where notices to employees are customarily posted.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 21, 2003

Peter C. Schaumber, Member

R. Alexander Acosta, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

Understandably offended by the ugly behavior of union organizer Fabienne Josephs in a series of incidents with the Charging Party Employer's managers, supervisors, and security guards, the majority stretches to find a violation of Section 8(b)(1)(A) of the Act. The Board certainly has held that employees may be coerced by a union's misconduct directed at *nonemployees* during the course of a strike, especially violent acts and threats toward managers, supervisors, security guards, and other nonemployees who cross a picket line.¹ But to establish a violation of Section 8(b)(1)(A), "there must be 'an unmistakable nexus' between the misconduct and a respondent's restraint and coercion of employees' Sec. 7 rights." *Culinary Workers Local 226 (Casino Royale, Inc.)*, 323 NLRB 148, 159 fn. 29 (1997) (quoting *Laborers Local 806*, 295 NLRB 941, 962 (1989), *enfd. mem.* 974 F.2d 1343 (9th Cir. 1992)).

Emphasizing the hospital setting here, as well as the combination of Josephs' abusive language over two weeks and her two "physical confrontations" with security guards, my colleagues conclude that it was the "ob-

¹⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹ See the cases cited at fn. 7 of the majority opinion. Although security guards may be statutory employees, they are treated in the same manner as supervisors or nonemployees for purposes of this 8(b)(1)(A) analysis, inasmuch as they are outside of the bargaining units. See *Auto Workers Local 695 (T. B. Wood's)*, 311 NLRB 1328, 1337 (1993); *Teamsters Local 507 (Klein News)*, 306 NLRB 118, 142 (1992); *Lumber Workers Local 3171 (Louisiana-Pacific)*, 274 NLRB 809, 813, 815 (1985).

vious” intent of Joseph to “send a message that Respondent would retaliate against anyone, including employees, who stood in its way.” While I do not condone Josephs’ behavior—it may well have amounted to actionable trespass under state law, and it almost certainly was not protected by the Act—I see no basis for finding a violation here. It seems dubious to me that employees would interpret Josephs’ actions as sending *them* any message at all, even indirectly. The record simply does not establish the required “unmistakable nexus” between Josephs’ conduct and the Section 7 rights of employees, the only legal interests that Section 8(b)(1)(A) is concerned with.

Factual Background

The facts are more fully detailed in the majority opinion and the judge’s decision. Briefly, in June 1998,² bargaining for a new collective-bargaining agreement had broken down, and the Union was preparing for a strike targeted to begin on July 1. Josephs was one of three organizers the Respondent had assigned to the Charging Party’s hospital. The Charging Party agreed to allow the organizers onto the Hospital’s property, but limited their access to meetings with unit employees in the cafeteria.

Josephs did not abide by the cafeteria limitation, and made her way into other public areas of the Hospital on June 4, 16, and 18. As a result, she was repeatedly confronted by the Charging Party’s security guards and managers on these dates. It is undisputed that unit employees either witnessed these confrontations or heard about them from others.

On June 4, Josephs headed for the labor and delivery department to retrieve a letter that nurses in the department had signed. Two security guards stopped her in the department waiting area and prevented her from entering the department itself. In the course of receiving the letter, she reached past one of the guards and made physical contact. She shouted that she could go anywhere in the Hospital she pleased, and she insulted the guards with racial and ethnic slurs. She then returned to the cafeteria.

On June 16, Josephs was standing outside the cafeteria wearing a T-shirt that referred to the pending strike. The Charging Party had banned the wearing of this shirt within the Hospital.³ As a guard approached her, she pulled off the shirt, revealing only a brassiere underneath. When the guard told her to put the shirt back on, she announced that she could walk around the Hospital naked, that no one could stop her, and she would go where she pleased. She proceeded to an area near the

emergency room, then to the dental department waiting area, and then through the hospital corridors back to the cafeteria, all the while shouting “la, la, la, la, wherever I want to go, you can’t stop me.” She made vulgar sexual and racially offensive statements to the guards who followed her, and she said she would kick their asses if they touched her.

Later that day, a security guard observed Josephs smoking outside the hospital in a nonsmoking area, and he instructed her to move to a proper location. She responded in a loud voice “go f—k yourself” and “I’ll stick my foot up your ass.”

On June 18, Josephs engaged in confrontations in the cafeteria with both Dr. Andrew Passeri, the Charging Party’s executive vice president and chief operating officer, and Dawn McMahon, the Charging Party’s security supervisor. Josephs accosted Passeri on the cafeteria food line, getting up close and shouting personal insults at him. When he went to pay for his food, she and an unidentified individual wearing a union T-shirt repeatedly blocked his path without making actual contact with him. As Passeri left the cafeteria Josephs shouted that he could and would be replaced. When Passeri departed, McMahon blocked Josephs’ path to prevent her from following Passeri, and Josephs bumped into her. Josephs told McMahon that she could be replaced as well. Josephs then loudly insulted McMahon using sexual vulgarities, before leaving the hospital property. During these events in the cafeteria, one unit employee asked McMahon if Josephs was going to keep her shirt on this time. Afterward, other unit employees told McMahon that they were embarrassed and disgusted at Josephs’ treatment of her.

Analysis

The essential question here is not whether Josephs behaved badly toward the Employer’s managers, supervisors, and security guards; not whether Josephs violated the Employer’s rules, committed trespass, or breached the peace of the Hospital; and not whether Josephs’ actions were protected by the Act, in connection with some counterreaction by the Employer. The issue, rather, is whether, in light of Josephs’ actions, unit employees could reasonably fear that *they* would be subject to violence, threats, or similar misconduct from union agents if they chose to cross some future picket line. Considered under established precedent, the record does not support the conclusion that Josephs’ behavior reasonably tended to coerce or restrain employees in their decision on supporting the strike projected to start on July 1. There is no basis here, then, for finding a violation of the Act.

Initially, I underscore my agreement with my colleagues, for the reasons set forth in their opinion, that

² All dates are in 1998.

³ There is no assertion that the Charging Party’s T-shirt rule was unlawful.

Josephs' threats to replace Passeri and McMahon on June 18 did not violate the Act. However, I think it worthwhile to linger for a moment on the image of union organizer Josephs standing in a crowded cafeteria, shrieking that she would fire the Hospital's chief operating officer and its head of security. By any reasonable estimation, this was a ludicrous scene. Her conduct was ridiculous—but, as my colleagues agree, certainly *not* coercive of the unit employees' choice to support a strike or not. In my view, Josephs' other rants and escapades on June 4, 16, and 18 are not significantly different.

Josephs neither committed acts of violence nor made any violent threats. Although she made physical contact with one of the security guards on June 4, in her effort to gain access to unit employees in the labor and delivery department, by all accounts this contact was insignificant and the result of the guards' effort to block her path. Indeed, the judge specifically rejected the contention that Josephs "pushed" a security guard. There is thus no basis for characterizing this incident as an assault.⁴ In a similar vein, Josephs' statements on June 16 to security guards that she would kick their asses if they touched her and (in the nonsmoking area) that she would "stick my foot up your ass" were, in context, merely figurative and would not reasonably have been perceived as actual threats of physical harm. See, e.g., *QIC Corp.*, 212 NLRB 63, 70 fn. 16 (1974).

The remaining conduct alleged to be coercive is the verbal abuse that Josephs directed at the Charging Party's managers and security guards. The possibility of a nexus between this kind of abuse and potential coercion of employees is significantly dispelled by the fact that it was not directed at employees, but at managers and security guards. Although, as discussed, the Board has found that a union may violate Section 8(b)(1)(A) by conduct directed at nonemployees, the conduct in those cases consisted of violence or threats of violence directed at individuals who crossed a picket line during an ongoing strike.⁵ The facts in this case are markedly different. Josephs committed no acts of violence and made no violent threats.

⁴ Compare *Retail Union District 65 (Eastern Camera)*, 141 NLRB 991, 994 (1963) (deliberately bumping customers into display windows when they attempted to cross picket line).

There is no contention that Josephs violated Sec. 8(b)(1)(A) by making similarly incidental contact with McMahon on June 18, when McMahon stepped in front of Josephs to prevent her from following Passeri.

⁵ While the majority points out that the relevant precedent does not expressly limit findings of unlawful conduct to picket-line incidents, neither do the cases suggest that the analysis should be extended to other circumstances.

More significantly, as my colleagues and the judge recognize, Josephs' abusive behavior was directed at the Charging Party's guards and managers primarily because they were enforcing the Hospital's access rules against her. Her abuse was in no way related to the security guards' and managers' having crossed a picket line or otherwise taking a contrary position in a labor dispute. Indeed, distinct from the situation in the relevant case law, there was no picket line, and no strike, at the time of Joseph's misbehavior. Although the strike set for July 1 was certainly part of the background of events on June 4, 16, and 18, Josephs made no reference to it in any of her tirades. The only allusion of any kind to the strike was the T-shirt Josephs wore on June 16, which she promptly removed before she paraded through the Hospital. Even if there had been a strike and picket line, and even if Josephs had directed her verbal abuse toward nonstriking employees, the Board's decisions strongly suggest that no violation of Section 8(b)(1)(A) would have been found.⁶ While my colleagues repeatedly assert that it was the overall intention of the Respondent, through Josephs, to coerce the employees into supporting a possible strike, they cite no specific evidence of her intent.

In sum, what we have here is a union organizer running half-dressed through the Hospital corridors, chanting childish slogans, shouting scatological and racial insults at guards, and humiliating managers without any overt motive. No violation is made out by that conduct. Implicitly acknowledging the weakness of the General Counsel's evidence, the majority does not concentrate solely on attempting to establish the required link between Josephs' misconduct and employees' Section 7 rights. Instead, my colleagues invoke the Charging Party's property rights and the maintenance of an appropriate atmosphere in a hospital setting.⁷ These are legitimate interests without a doubt (although it is not imme-

⁶ See, e.g., *Masters, Mates & Pilots (Marine Transport Lines)*, 301 NLRB 526, 531–532 (1991), *enfd.* in pertinent part 955 F.2d 212 (4th Cir. 1992) (in absence of threat of bodily harm, picketers did not violate Sec. 8(b)(1)(A) by calling employees "finks" and "scabs"); *Machinists (General Dynamics)*, 284 NLRB 1101, 1106 (1987) (calling strike-breaker "pile of shit" did not violate Sec. 8(b)(1)(A)); *Longview Furniture Co.*, 100 NLRB 301, 304 fn. 38 (1952), *enfd.* as modified 206 F.2d 274 (4th Cir. 1953) (picket-line name-calling such as "trash, low-down trash, damn woman, scabs, damn scabs, low-down scabs, yellow scabs, crummy scabs, damn bitch, son of a bitch, damn son of a bitch, scabby son of a bitch" held to be protected activity).

⁷ The majority cites *Brockton Hospital*, 333 NLRB 1367 (2001), *enf.* in pertinent part 294 F.3d 100 (D.C. Cir. 2002), *cert. denied* 123 S.Ct. 850 (2003) (addressing legality of hospital's no-solicitation/no-distribution policy); and *W.C. McQuaide*, 220 NLRB 593, 594 (1975) (addressing legality of discharge of striking employees for misconduct), in support of these interests. However, neither case involved allegations that a union restrained or coerced employees in violation of Sec. 8(b)(1)(A).

diately apparent why hospital workers would be more fragile than, say, factory employees). However, the majority cites no cases, and provides no statutory basis, to justify the use of Section 8(b)(1)(A) to protect them. The image evoked by the majority, of a hospital “powerless to protect its own legal rights,”⁸ is both dubious on its own terms⁹ and irrelevant to the issue here.

Searching for a rationale to find a violation, my colleagues combine Josephs’ verbal tirades and her isolated, incidental physical contact with the Charging Party Employer’s agents to find “harassment,” more serious than verbal abuse and only slightly less serious than physical violence. But whatever label is placed on Josephs’ actions, the evidence still fails to establish an “unmistakable nexus” between her conduct and the unit employees’ exercise of Section 7 rights.

Bad as it was, Josephs’ behavior had no impact cognizable under Section 8(b)(1)(A). The complaint should be dismissed on that basis. Nothing in that result, meanwhile, prevents the Employer from protecting its own legitimate interests with respect to Josephs’ actions. That her conduct was not an unfair labor practice does not mean that it is affirmatively protected by the Act or that State law remedies are unavailable to redress it. Because the majority confuses these issues, I dissent.

Dated, Washington, D.C. August 21, 2003

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES AND MEMBERS

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

⁸ The majority takes this quotation from the decision of a divided Board in *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991), which involved objections to the conduct of a close representation election—not an alleged 8(b)(1)(A) violation—following a belligerent confrontation between two union organizers and the employer’s president, on employer property, 75 minutes before voting began. Both factually and legally, the decision has no application here.

⁹ Every area outside the hospital cafeteria that Josephs “visited” on the three dates in question was open to the general public. The Charging Party’s immediate property concern with Josephs’ misconduct was that she was violating its “cafeteria-only” access rule, not that she was invading surgical chambers or intensive-care units.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT restrain and coerce employees of Staten Island University Hospital in their right not to join or support any strike, by refusing, in the presence of employees, to comply on request with lawful rules and directions regarding access and conduct on the premises of Staten Island University Hospital, including the following conduct: shouting and cursing that our agents cannot be stopped from entering immediate patient care areas; making racist remarks to individuals; making sexually degrading remarks to individuals; making physical contact with individuals; and removing our clothing and stating that our officials can walk unclothed around the premises of Staten Island University Hospital.

WE WILL NOT threaten to physically assault individuals in the presence of employees.

WE WILL NOT block individuals’ egress within the premises of Staten Island University Hospital in the presence of employees.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

1199 NATIONAL HEALTH & HUMAN SERVICE
EMPLOYEES UNION, SEIU, AFL–CIO

Adrienne Connolly, Esq., for the General Counsel.

Veronica Villanueva, Esq., for Respondent.

Kevin McGill, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARGARET M. KERN, Administrative Law Judge. This case was tried before me in Brooklyn, New York, on June 16, 1999. The complaint, which issued on November 30, 1998, was based on an unfair labor practice charge filed on June 22, 1998,¹ by Staten Island University Hospital (employer or hospital) against 1199, National Health & Human Service Employees Union, SEIU, AFL–CIO (Union or Respondent).

It is alleged that in June 1998, Respondent, through its organizer and admitted agent, Fabienne Josephs, engaged in a series of acts of misconduct on the hospital’s premises in violation of Section 8(b)(1)(A). Respondent argues that many of

¹ All dates are 1998 unless otherwise indicated.

these incidents never occurred or, in the alternative, that Josephs' conduct did not constitute an unfair labor practice. For the reasons set forth herein, I find that Josephs engaged in serious acts of misconduct in violation of the Act.²

FINDINGS OF FACT

I. JURISDICTION

Respondent admits and I find that the employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits and I find that it is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The employer operates an acute care hospital on Staten Island at two sites, 450 Seaview Avenue (north site) and 375 Seguin Avenue (south site), and employs approximately 5000 employees. Respondent represents approximately 2000 of these employees in two collective-bargaining units, one unit at the north site and the other at the south site. Unit employees include service, technical, clerical, and professional employees. With the exception of administration and finance, Respondent represents employees in every department in the hospital. More specifically, Respondent represents employees in the emergency and dental departments, patient care associates in the labor and delivery department and cafeteria workers.

On the first floor of the north site is a lobby with a gift shop, a waiting area, a television/telephone rental office, a security desk, and a volunteer desk. Also on the first floor is the emergency and dental departments. A large circular staircase leads from the lobby to the second floor where there is a cafeteria with a food service area and a seating area, which can accommodate up to 300 people. This cafeteria is the area designated by the Employer for Respondent's representatives to communicate with employees.³ The labor and delivery department is also on the second floor. Access to the labor and delivery department is restricted, and the door leading into the department

is kept locked. A person can gain access by communicating through an intercom.

In the spring of 1998, Respondent was involved in contract negotiations with the League of Voluntary Hospitals of which the Employer is a member. Caryl Mahoney, senior vice president for human resources, was a member of the hospital's negotiating committee. Mahoney testified that in May and June negotiations began to break down and there was talk of a strike. Strike preparations were made by Respondent which included specific activities at the employer's facility. On May 22, Respondent conducted a "walk-in" in the human resources department to demand that management sign a contract consistent with Respondent's demands. On May 26, Respondent conducted a vote in the north site cafeteria to decide if informational picketing should be conducted. By letter dated May 29, Ray Camacho, Respondent's vice-president, served Section 8(g) notice of Respondent's intention to conduct informational picketing on June 10, which picketing did in fact take place at both the north and south sites. By letter dated June 11, John Reid, Respondent's executive vice president, notified the employer that Fabienne Josephs, Melanie Swann, and Joseph Bias⁴ were the organizers assigned to the hospital. From June 15 to 17, a strike vote was conducted in the north site cafeteria. On June 18, Respondent conducted a citywide demonstration in Times Square in support of its contract demands and, on that same date, Dennis Rivera, Respondent's president, served written notice on the Employer of Respondent's intent to engage in a strike as of July 1.

In response to Respondent's strike preparations, the Employer distributed two memos to employees dated June 8 and 18. Each dealt with the potential impact of the strike on the hospital and the employees, the issue of striker replacements and the rights of employees to participate or not to participate in the strike. Mahoney testified that the June 18 memo was distributed to employees through the interoffice mail on June 18 and 19.

B. The Events of June 4

Troy Boone is a uniformed security officer who observed Josephs in the cafeteria at about 9:45 p.m. on June 4. He was unfamiliar with who she was and he went downstairs to the lobby and inquired of Security Sergeant Rafael Velasquez as to Josephs' identity. As Boone was speaking with Velasquez, Josephs entered the lobby and the two security guards asked her where she was going. Josephs said she was going to the emergency room. Boone said she was not allowed in patient care areas and Josephs walked past him. Boone radioed to security officers in the emergency room to keep an eye on her.

About 10 minutes later, Josephs returned to the lobby from the direction of the emergency room. According to Velasquez, she was accompanied by a male and was distributing flyers. Both Boone and Velasquez testified that they told Josephs at that time that she had to remain in the cafeteria. Josephs did not respond but walked up the stairway followed by Boone and Velasquez. She stayed in the cafeteria for a minute or two and then walked down the second floor hallway towards the labor

² By letter dated August 26, Respondent sought to reopen the record and introduce evidence relating to the disposition of EEOC complaints, which were premised on the same conduct alleged to have taken place in this case. The General Counsel opposed the application by letter dated August 31. The motion and response are made a part of this record as R. Exh. 7. The motion is denied for the reasons set forth in the General Counsel's opposition. Even if I were to consider the proffered evidence, it would not change my findings in this case.

³ No evidence was introduced regarding any provision of the collective bargaining agreement relating to Respondent's right of access to employees and there is no claim by Respondent that the designation of the cafeteria was unlawfully restrictive. Generally, a health care facility can prohibit solicitation and distribution in immediate patient care areas, which are inclusive of patient rooms, operating rooms, places where patients receive treatment, adjacent corridors, and waiting rooms. *Cooper Health System*, 327 NLRB 1159 (1999); *Doctors' Hospital of Staten Island*, 325 NLRB 730 (1998).

⁴ Biasi is an admitted agent of Respondent.

and delivery department. As she walked, Boone again told her she needed to stay in the cafeteria but she ignored his directive. As Josephs got to the labor and delivery waiting area, Boone and Velasquez repeated that she could not be in that area. Josephs said she needed to get a paper from the nurses about the strike and that they were not going to stop her. Boone and Velasquez stood shoulder to shoulder in front of the door leading from the waiting area to the interior of the department and repeatedly told Josephs she could not enter. Josephs responded that she was going in and that no one was going to stop her. Josephs reached past Boone to hit the intercom and in doing so made physical contact with him. Her voice became very loud and she stated repeatedly that they were not going to stop her. A nurse opened the door and asked what was going on. Josephs said she needed to get a letter that had been signed by the nurses. The nurse went back inside the department and came out with a piece of paper and handed it to Josephs. By that time, Josephs was yelling and screaming repeatedly, "You can't stop me, I can do anything I want, I can go anywhere I please." Josephs told Velasquez, "You should go back to Puerto Rico, you little wetback." Boone radioed to the lobby and told them to call 911 to have Josephs removed from the premises. After that, Josephs began walking back to the cafeteria. She called Boone a "black gorilla walking in a white man's footsteps."

The confrontation at the door to the labor and delivery department lasted approximately 10 to 20 minutes and according to Velasquez "a lot of people" stopped to observe the commotion including employees.

Josephs testified that this confrontation never took place. She acknowledged having entered the hospital that day for a 6 p.m. meeting but testified that she left the hospital at around 7 p.m. and went home. Josephs testified that she did see Boone and Velasquez in that 1-hour period of time and that she chatted pleasantly with them.

C. The Events of June 16

1. Outside the cafeteria

On June 16, at about 3:30 p.m., security officer Gerard Nelson was posted at the entrance to the cafeteria. Employees and visitors were inside. Nelson noticed Josephs standing outside the cafeteria in the second floor hallway in front of a bulletin board on which there were job postings. Josephs was wearing a t-shirt on the front of which was a calendar and the date "July 1" and on the back were the words "contract or strike." Nelson had been given instructions that no employee or organizer was allowed to wear strike t-shirts in the hospital. According to Nelson, as he approached Josephs, she spontaneously began to raise the t-shirt over her head and said, "Well, I'll take it off." Nelson observed that all Josephs had on under the T-shirt was a bra. Nelson told her to put the shirt back on. Josephs responded in a loud voice that she could walk around the hospital naked and that Nelson could not stop her. Nelson advised her that she could not walk around the hospital naked and that if she wanted to try, he would call the police and have her removed for indecent exposure. Josephs told Nelson that he could not touch her, that he could not stop her and that she could go wherever she wanted in the hospital. She began to walk down the staircase and Nelson radioed to Sergeant Velasquez who told Nelson to

follow Josephs to make sure that she did not enter any patient care area. As Nelson proceeded to follow Josephs, he told her that she had to go back to the cafeteria where she could conduct any type of union business. Josephs responded that she could go anywhere she pleased.

Josephs testified that Nelson instructed her to remove the T-shirt and that she told him that the T-shirt was all she had to wear. She further testified that she told Nelson that she was not going to go home to change because in her opinion there was nothing offensive about the T-shirt. She denied having made any attempt to remove the shirt and denied raising her voice to Nelson.

2. In the emergency and dental departments

According to Nelson, Josephs descended the staircase to the lobby and walked the length of a 75-foot hallway to the emergency room waiting area. The door to the emergency room itself was locked, and Nelson stood in front of the door blocking Josephs from proceeding further. He repeated that she could not talk to employees in patient care areas and that she must talk to them in the cafeteria. Josephs shouted in a very loud voice, "go f—k yourself. I can go wherever I want to go." Nelson testified that this area of the hospital is regularly frequented by patients, visitors, and employees, and that at the time of this incident, the hallway was used as a walkthrough to the cafeteria, and to the main part of the hospital. Employees were present in the hallway when this incident occurred. Josephs turned and headed toward the dental department located off the same hallway. She entered the waiting room, where from 10 to 20 patients were waiting to be seen, and Nelson again advised her she was not allowed in patient care areas. Josephs put her hands over her ears and shouted, "I'm not listening to you. I don't care what you're saying. You touch me and I'll kick all your asses." Nelson was joined by Boone who heard the commotion. Boone testified that a wall with a window and a door separated the waiting room from the interior patient care area and he observed employees through the window.

Josephs left the dental department and walked back to the lobby heading toward the staircase. En route, she yelled, "la, la, la, la, wherever I want to go, you can't stop me." Referring to Boone, she yelled "you little black gorilla, you're an Uncle Tom." When she reached the middle of the lobby, in the area in front of the security desk and the volunteers' desk, she stated in a loud voice, "I should have taken my top off and gotten naked because I know you white boys like black women." Her statement, according to Boone, was accompanied by sexually suggestive hand gestures. Nelson testified that employees and visitors were present in the lobby at the time. Eventually, Josephs ascended the staircase and returned to the cafeteria.

Josephs testified that when she went to the emergency department, Nelson and Boone were not present and no one attempted to prevent her from entering. She spoke to the employees in the department and reminded them that she was in the cafeteria and that they should come in to vote. The employees told her they would be there on their lunchbreak. Josephs testified that she gave the same reminder to the employees in the dental department. She denied having had an argument with

Nelson and Boone, denied raising her voice, and denied calling Boone a “black gorilla” or an “Uncle Tom.”

3. At the flag pole

Walter Cyran is a security guard who recalled that on the afternoon of June 16 he was dispatched to the cafeteria. Upon his arrival, he observed Josephs walking toward him wearing a strike T-shirt. Cyran asked her name and she responded, “Joe Blow.” Cyran again asked her name and she did not respond. Josephs walked down the staircase, exited the building, and sat down by a flagpole. There were signs posted indicating that this was a nonsmoking area. Josephs lit a cigarette and Cyran, who had followed her, asked her to move to the smoking area. She responded in a loud voice, “go f—k yourself” and “I’ll stick my foot up your ass.” According to Cyran, employees, nurses, and patient care employees as well as patients and visitors were present at the time. Josephs threw the cigarette down and reentered the building.

Josephs testified that this incident involving Cyran never occurred.

D. The Events of June 18

1. The General Counsel’s version

Dawn McMahon is the hospital’s security services supervisor. At about 1:10 p.m. she received a call from Pacheco of human resources who reported that there was an unidentified union organizer in the cafeteria who had to be asked to leave. When McMahon arrived, she observed that the cafeteria was very crowded with employees, visitors, and patients and there were no empty seats. She recognized employees from their uniforms and from their identification badges. McMahon further observed Josephs and Biasi seated at a table with an unidentified male. David Greenberg, another organizer, was seated a few tables away, in the center of the seating area of the cafeteria, talking with several employees. McMahon conferred with Pacheco and confirmed that Greenberg was not on the June 11 list of authorized union representatives.

McMahon, who was dressed in a business suit, approached Greenberg in the center of the seating area and asked if she could speak with him for a moment. As he stood, Josephs and Biasi approached and Josephs stepped between McMahon and Greenberg. Josephs asked McMahon what she was saying to Greenberg and McMahon replied that there was something she needed to discuss with him and that if Josephs wanted to join the conversation she was welcome to do so. McMahon showed Josephs the June 11 letter and stated that since Greenberg was not listed in the letter they needed to discuss the situation. According to McMahon, Josephs responded by shouting, “Dawn, don’t waste my time. Just call the police.” McMahon explained that the problem was with Greenberg, not Josephs or Biasi, and if there was going to be a decision not to cooperate, it should be Greenberg’s decision. Josephs repeated that McMahon should call the police. According to McMahon, people’s attention was drawn to Josephs’ shouting.

McMahon stepped to the side of the cafeteria and ordered security officer Destafano to call the police. McMahon remained at the entrance to the cafeteria to observe Josephs, Biasi, and Greenberg. After a short while, Josephs walked toward

the area where McMahon was standing and where there was a payphone. Josephs repeatedly picked up the receiver and put it down without placing a call. McMahon heard her say, “[L]ook at her. She’s so ridiculous. Look at her and her guards. This is ridiculous. They’re a damn joke.” Employees were passing by as Josephs was making these comments and one unidentified employee, dressed in a patient care uniform, said to McMahon “[I]s she going to keep her shirt on this time?” McMahon saw a New York City police sergeant coming up the main staircase. She stepped outside the cafeteria into the hallway and asked the sergeant, who was in the hospital on other business, why there was a delay in the police response and the sergeant placed a second radio call for assistance. As McMahon was speaking to the police sergeant, she observed Dr. Andrew Passeri, the Employer’s executive vice president and chief operating officer, enter the cafeteria.

Passeri walked to the food service area and was pouring himself a bowl of soup when he was approached from behind by Josephs. Passeri turned to face her and she came within 8 inches of his face and body but without making physical contact. According to Passeri, Josephs began screaming at him. Taken aback, Passeri asked Josephs who she was. Josephs identified herself as a representative of the Union. Among the statements that Passeri could recall being uttered by Josephs was that he ought to be ashamed of himself, that he should wear a bag over his head, and that he ought to move from Tote Hill (an affluent section of Staten Island) to Bay Street where his employees live. While Josephs was standing in front of Passeri, he observed a male wearing a union T-shirt approach him. The male stood to Passeri’s side and also yelled at him. Passeri began to try to walk to the cashier carrying his tray and as he did so Josephs and the male stood in front of him, blocking his progress. They stopped and gave him room to move. As Passeri attempted to go around them, they stepped in front of him again, forcing him to stop. This pattern continued as Passeri made his way to the cashier with Josephs’ and the male continuously shouting at him. After Passeri paid for his meal he walked towards the entrance/exit of the cafeteria, a distance of about 75 feet through the crowded seating area. As he got to the entrance, Josephs and the male approached him from his right and resumed shouting at him. He walked through the entrance to the staircase. As he proceeded down the staircase, he heard Josephs at the top of the stairs shouting to him that he could be replaced and that he would be replaced.

When McMahon finished speaking with the police sergeant, she reentered the cafeteria and observed Passeri in the food service area with Josephs and Biasi pursuing him.⁵ She heard Josephs saying that Passeri should be ashamed of himself and that he should give up his house on Tote Hill. She then saw Passeri passing through the cashier area and walking toward her at the entrance. He appeared to be distressed: his face was red and twisted and he was walking quickly. McMahon maintained her position at the entrance to the cafeteria and let Passeri pass by her. Josephs was following Passeri and McMahon stepped in her path to block her from pursuing Passeri further. Josephs

⁵ It is not clear if Biasi was the same male who blocked Passeri’s path to the cashier.

walked right into McMahon making physical contact. She reached with one arm over McMahon's shoulder and shouted that Passeri should be ashamed of himself, that he should give up his Tote Hill house, and that he should move to Bay Street. According to McMahon, by the time Passeri was at the turn of the stairs, Josephs stepped around McMahon and shouted to Passeri that he could be replaced. She then turned, put her finger in McMahon's face and said, "and so can you." A small crowd of 10 to 20 people, including employees, gathered at the entrance to the cafeteria and observed this confrontation.

Josephs, Biasi, and Greenberg went back into the cafeteria and McMahon remained at the entrance to continue waiting for the police. Greenberg asked McMahon why he had to leave and she reiterated that he was not authorized to be on the premises as an organizer. Josephs then addressed McMahon in a loud voice, "Look at you in your nice suit. I know how you got that suit, honey." She continued, "do you know why she's wearing pants? To hide the marks on her knees. You must have sucked a lot of dick to get that job." When she was making these remarks, Josephs was about 4 to 5 feet from McMahon and employees and visitors were walking between them. The three organizers began to leave and as they did so Josephs continued in a loud voice: "[W]ell, you better check her back, too. I betcha you'll find some scars there. Dawn. Dawn. Dawn. Dawn does Staten Island Hospital." Josephs began to descend the staircase and when she reached the turn of the stairs, she yelled toward McMahon, "It's amazing you can talk with that mouth as busy as you were to get that job. I know how you got that job and your suit, honey." She then called McMahon a "bitch." McMahon followed Josephs, Biasi and Greenberg down the staircase with two other security officers and as Josephs walked toward the front door of the lobby she repeated three times "Dawn does Staten Island Hospital." The New York City Police Department arrived at approximately 1:30 p.m., at the same time that Josephs, Biasi, and Greenberg exited the building.

During the 20 minutes that McMahon was in the cafeteria, the room was filled to capacity. The second floor hallway, the staircase, and the main lobby was heavily traveled with the hospital's normal midday traffic.

McMahon's office is in a trailer located in front of the hospital. In order to get from her office to the building, she passed through a smoking area usually heavily populated by employees. On the days following this incident, each time she passed the smoking area, employees addressed her, stating that they had heard what had happened and inquired as to her well being. Some of the employees said they were members of the Union and they were embarrassed and disgusted at how she had been treated.

2. Respondent's version

Greenberg testified that around noontime he was seated at a table in the cafeteria talking to employees when he was approached by a male and told that he could only meet with workers in the back of the cafeteria. Greenberg responded that this was not the back of the bus and that the Union had access to the entire cafeteria. Greenberg moved to the middle of the cafeteria and was sitting at another table with employees when McMahon approached him and asked if she could speak with

him in private. He stood up and they moved about 10 feet from the table. McMahon stated that he was not on the list of organizers allowed to be at the hospital and that he had to leave. He told her he was a union organizer and that he had a right to be there. McMahon walked away and Greenberg notified Josephs of what was happening. Josephs, Biasi, and Greenberg then approached McMahon and Josephs reiterated Greenberg's right to be present. McMahon said if he didn't leave she would call the police. McMahon left and Greenberg resumed talking with employees at one of the tables. He heard a comment come from unidentified persons in the cafeteria asking how McMahon got her job.

Josephs testified that at around 11:30 a.m., she was present in the cafeteria, which was "pretty quiet," and she had a copy of the June 18 memo in her hand. She approached Passeri and cordially stated, "Good morning. My name is Fabienne Josephs. I'm from 1199." She told Passeri that she needed to talk to him about his June 18 memo. Passeri responded that Josephs should talk to his attorney and Josephs said no, she needed to talk to him because his name was on the memo. She asked him how he could sleep at night and that he should be ashamed of himself for putting out information that caused a great deal of confusion in the hospital. She also told him he should walk around the hospital with a brown bag over his head. Passeri said to Josephs, "please, I'm here to have my lunch," and he kept on walking. According to Josephs, she walked alongside of Passeri as he got his soup, paid the cashier, got napkins and utensils, and left the cafeteria, all the while talking to him in a conversational tone. Josephs denied yelling or raising her voice to Passeri. She also denied seeing McMahon at any time during her encounter with Passeri.

According to Josephs, it was not until some time later that afternoon that she encountered McMahon in the cafeteria, and by that time the cafeteria had become very crowded. McMahon approached Josephs near the entrance to the cafeteria and McMahon had a letter in her hand. She said that Josephs and Biasi were allowed access to the hospital but that she had not been given any information regarding Greenberg. Josephs said he was a union organizer. McMahon said he nevertheless had to leave. Josephs asked why and suggested McMahon talk to Pacheco. McMahon said she had been instructed by Pacheco to tell Greenberg to leave. Josephs acknowledged in her testimony that McMahon made it clear that she and Biasi did not have to leave, only Greenberg. McMahon said that if Greenberg didn't leave, she would have to call the police. Josephs said fine, call the police. Josephs denied yelling at McMahon and denied that she was the one who was the first to suggest calling the police. She did recall hearing unidentified persons in the cafeteria shouting comments to McMahon. "Someone made a comment in regards to, yelled out, 'we know how you got your job.'"

Josephs was unable to recall at the time of her testimony how long she had been assigned to the Employer's facility as an organizer at the time of the events at issue. She could not recall why she was present in the hospital on June 18 other than to talk to members. She could not recall the date that she received a copy of the June 8 memo and she could not recall the date that she received a copy of the June 18 memo:

Q: When? When did you get Respondent's 3? That's the June 8th memo. When did you first receive that?

A: I can't recall, but I did receive them.

Q: When did you first receive Respondent's 4, the June 18th memo?

A: I'm going to say the same, I can't recall the approximate dates, you know, they were given to me. Whether it was morning or afternoon, or, but they were given to me.

I don't recall approximately the date and time that I received them. If it was June 4th, June 5th, I can't, but I know definitely it was the end of June.

IV. ANALYSIS

A. Credibility

Resolution of the factual issues in this case turns purely on credibility. Witnesses for the General Counsel and Respondent presented irreconcilable versions of the same events. Without hesitation, I credit the testimony of the General Counsel witnesses over Respondent's witnesses.

Anthony Passeri and Dawn McMahon were impressive witnesses with excellent recall of events. Neither was given to exaggeration and their testimony was internally consistent as well as consistent with the observations of the security guard witnesses. Both were equally responsive on direct and cross-examination. The professional restraint which both exhibited during the course of their confrontations with Josephs was reflected in their demeanor on the witness stand. I fully credit both of these witnesses' testimony and where there is a conflict between their testimony and that of Respondent's witnesses Josephs and Greenberg, I credit Passeri and McMahon.

Security officers Nelson, Velasquez, Boone, and Cyran were also entirely credible witnesses. None of these witnesses had any prior dealing with Josephs and the evidence failed to adduce a motive for them to fabricate their testimony. Indeed, Cyran described his utter bewilderment at Josephs' behavior, a woman he had never spoken to before and hasn't spoken to since. Boone did appear somewhat reluctant to discuss the incident involving Josephs calling him a "black gorilla." I do not construe this hesitancy to mean that this statement was not made, but rather, that Boone was personally embarrassed by this particularly offensive confrontation. In all other respects, Boone testified, as did the other witnesses, in a clear and straightforward manner. Where there is a conflict between their testimony and that of Josephs and Greenberg, I credit Nelson, Velasquez, Boone, and Cyran.

I thoroughly discredit the testimony of Josephs. On the witness stand she testified in a soft-spoken voice in what appeared to be a contrived attempt to present herself as a person incapable of engaging in the loud behaviors attributed to her by the General Counsel's witnesses. She could not recall how long she had been assigned as an organizer at the Employer's facility at the time of her testimony. She could not recall why she was present in the hospital on June 18 other than to talk to members. Despite the fact that she claimed that the June 18 memo was the reason she approached Passeri in the cafeteria, she could not

recall when she received the memo. Her recollection of times and dates were blurred. I consider Josephs repeated denials of having engaged in the conduct alleged in the complaint to have been motivated purely by self-interest and the interest of Respondent.

I similarly do not hesitate to discredit the testimony of Greenburgh. Particularly noteworthy was his weak attempt to explain away the testimony of Dawn McMahon wherein she described how Josephs loudly accused her of engaging in sexual behavior in order to obtain her job as security supervisor. Attempting to corroborate Josephs' testimony on this point, Greenburgh testified that he heard unidentified voices emanating from somewhere in the cafeteria asking how McMahon got her job. Spontaneous utterances from unknown persons not otherwise involved in the events unfolding in the cafeteria strike me as highly suspect. When juxtaposed with McMahon's credible testimony that it was Josephs who made these comments, Greenburgh's testimony becomes plainly incredible.

B. Specific Acts of Misconduct

Having resolved the credibility issues in this case, I make the following findings with respect to specific acts of misconduct engaged in by Josephs.

Paragraph 7 of the complaint contains four allegations relating to the events of June 4: (a) that Josephs shouted while pounding on the door of the labor and delivery department in an attempt to gain access; (b) that she cursed and shouted at security guards; (c) that she made racist remarks; and (d) that she pushed a security guard. With respect to the first allegation, there is ample evidence that Josephs continually shouted remarks as she was being blocked by Boone and Velasquez from entering the labor and delivery department. She repeatedly yelled that they were not going to stop her, that she could do anything she wanted and that she could go anywhere in the hospital she pleased. There is no evidence, however, that she pounded on the door. Boone and Velasquez testified that they stood shoulder to shoulder in front of the door, thus blocking her ability to pound on the door. The second allegation is largely repetitive of the first. Clearly Josephs was shouting during the confrontation with the security guards although neither Boone nor Velasquez testified to her use of profanity during this particular confrontation. With respect to the third allegation, I find that Josephs did call Velasquez a "little wetback" who "should go back to Puerto Rico," and that she called Boone a "black gorilla walking in a white man's footsteps." With respect to the fourth and final allegation of this paragraph in the complaint, there is no evidence that Josephs actually pushed either Boone or Velasquez. The extent of the physical contact made was when Josephs reached past Boone in an effort to hit the intercom buzzer and gain access to the department. I therefore find that on June 4 Josephs engaged in three acts of conduct encompassed by the complaint: she repeatedly shouted at two security guards who were performing their lawful duty that she could not be stopped from entering patient care areas, directed racist remarks to each of them, and made physical contact with one of them.

Paragraph 8 of the complaint contains three allegations relating to the events of June 16 which occurred in the vicinity of

the cafeteria: (a) that Josephs threatened security guards with physical harm; (b) that she informed them that she could do anything she wanted and could not be stopped; and (c) that she directed racist remarks to them. No evidence was adduced regarding the first and third allegations. Nelson did not testify as to any threats of physical harm or to Josephs having made racist remarks to him during this particular confrontation. He did, however, credibly testify that Josephs spontaneously took her shirt off in his presence and that when Nelson told her to put her shirt back on, Josephs stated in a loud voice that she could walk around the hospital naked if she chose to, that he could not stop her, and that she could go anywhere she pleased in the hospital.

Paragraph 10 of the complaint contains the single allegation that sometime in late June, Josephs made racist remarks in the area of the dental department. The evidence shows, and I find, that on June 16, while leaving the dental area and walking toward the lobby, Josephs called Boone a “black gorilla” and an “Uncle Tom.” The evidence further establishes several other acts on June 16 which arguably violated Section 8(b)(1)(A) but which were not specifically alleged in the complaint. Nevertheless I find that these events occurred as part of one continuous event with the dental department incident, that the issues raised by these events are identical to the issues raised by other complaint allegations and that these matters were fully litigated at the hearing. *Williams Pipeline Co.*, 315 NLRB 630 (1994); *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), enf’d. 920 F.2d 130 (2d Cir. 1990). I therefore make the following findings: in the emergency room department, Josephs shouted that she could go wherever she pleased in the hospital and that Nelson should “go f—k” himself; in the dental department, Josephs shouted to Nelson that if he touched her she would “kick all your asses”; in the lobby, Josephs made sexually suggestive gestures to Nelson and Boone while stating that she should have taken her shirt off and gotten naked because “you white boys like black women.”

Paragraph 9 of the complaint alleges that Josephs threatened a security guard with physical harm. The evidence establishes and I find that on June 16, when Cyran told Josephs not to smoke in a no-smoking area, Josephs told Cyran “go f—k yourself” and “I’ll stick my foot up your ass.”

Paragraph 11 of the complaint contains five allegations relating to the confrontation in the cafeteria involving McMahon and Passeri: (a) that Josephs shouted at security guards to call the police after she was informed that Greenburgh was not entitled to be present in the cafeteria; (b) that she threatened Passeri with loss of his job; (c) that she attempted to grab Passeri’s arm and attempted to block his egress from the cafeteria; (d) that she told McMahon that she would be replaced in her job by the Employer; and (e) that McMahon engaged in sexual conduct to secure her job. The evidence establishes, and I find, that Josephs shouted at security guards to call the police, that she threatened both Passeri and McMahon that they could be replaced in their jobs, and that she accused McMahon of engaging in sexual conduct to secure her job. I further find that Josephs repeatedly blocked Passeri’s egress from the cafeteria by standing directly in his path and forcing him to walk around

her. There is no evidence, however, that Josephs made physical contact or attempted to make physical contact with Passeri.

C. Presence of Employees

Having determined that Josephs’ engaged in the foregoing acts of misconduct, the next issue is whether she committed those acts in the presence of employees. In every instance, Josephs’ actions were directed toward nonemployees: managers, supervisors, and security guards. Since acts of intimidation directed against security guards are treated in the same manner as those directed against nonemployees and supervisors, *Culinary Workers Local 226 (Casino Royale, Inc.)*, 323 NLRB 148, 160 (1997), the standard to be applied in each case is whether the act was committed in the presence of employees or under such circumstances as to insure that employees would hear about it. *Furniture Workers Local 309 (Smith Cabinet Mfg. Co.)*, 81 NLRB 886, 888–889 (1949). I find that in each instance the General Counsel has met this standard by a preponderance of the evidence.

As to the June 4 incident by the door to the labor and delivery department, the credible testimony of Boone and Velasquez establishes that employees stopped to observe the confrontation. Josephs’ behavior during this incident was characteristic of her behavior throughout. Each event was marked by her screaming, yelling, or speaking in a very loud tone of voice. The significance of this behavior cannot, I think, be overestimated. The place of these occurrences was not a casino in Las Vegas, but a hospital. Josephs’ continual screaming and shouting had the inevitable effect of drawing attention to herself. Indeed, the General Counsel argues, and I agree, that the whole point of Josephs engaging in this conduct was to draw attention to herself and once that attention was drawn, to engage in such outrageous behavior as to have the effect of restraining and coercing employees to support the Union’s strike efforts. There is no doubt that employees’ attention was drawn to Josephs during the June 4 incident.

With respect to the June 16 incident outside the cafeteria, Nelson did not specifically testify that employees were present in the hallway when Josephs’ lifted her shirt over her head, exposing her underwear. There were, however, employees present inside the cafeteria and McMahon’s testimony recalling the employee comment “is she going to keep her shirt on this time?” establishes that word traveled fairly quickly. This was a hospital, and Josephs’ removal of her shirt in that particular setting was a provocative act and one certain to be learned of by employees.

With respect to the emergency room incident, the credible and uncontradicted testimony is that employees were physically present. With respect to the dental department incident, a wall with a glass partition separated the dental department employees from the waiting area where Josephs’ was yelling. Nevertheless, Josephs’ behavior was such that the employees were certain to learn about it. In the presence of about 20 patients, Josephs’ put her hands over her ears and shouted, “I’m not listening to you. I don’t care what you’re saying. You touch me and I’ll kick all your asses.” A screaming woman with her hands over her ears was likely to draw the visual attention of the employees working behind the glass partition. It is also fair

to infer, barring some evidence that the wall was a soundproof barrier, that her shouting could be heard through the glass. In any event, it seems inevitable to me that at least a few of the 20 patients who witnessed this encounter would have made mention of it to the employees once they were admitted to the immediate patient care area.

Continuing in her effort to draw attention to herself, as Josephs walked down the 75-foot hallway to return to the lobby, again a hallway frequented by employees, she yelled, "la, la, la, la, wherever I want to go, you can't stop me." She then called Boone a "black gorilla" and an "Uncle Tom." When she entered the lobby, she made the sexually suggestive gestures and comments about being naked in the presence of employees. Similarly, employees were present and in a position to witness the incident by the flagpole and all of the incidents in the cafeteria on June 18.

One issue not specifically addressed by any of the parties either at the hearing or in their briefs, is whether the employees who witnessed these acts were members of the bargaining unit. There is no direct evidence establishing this fact since in every instance, the testimony is that "employees" were present. The General Counsel appears to suggest, without specifically stating, that because the Union represented 2000 employees in all but two departments in the hospital, that it is fair to infer that the employees who were present at these incidents must have been bargaining unit employees, or alternatively, that bargaining unit employees must have learned of these incidents. I agree that this inference may be fairly drawn from all of the circumstances of this case. I will nevertheless address this issue of whether Section 8(b)(1)(A) is implicated if these acts were witnessed or learned about only by nonunit employees as the evidence allows for this possibility. Of concern is the language used by the administrative law judge in *Casino Royale* wherein he noted the presence or awareness by "individuals . . . employed by the *Casino Royale* in job classifications normally represented by Respondent" in determining whether there had been an 8(b)(1)(A) violation. I do not, however, read this decision, affirmed by the Board, as limiting the finding of an unfair labor practice to only those cases involving coercive conduct directed toward nonemployees in the presence of bargaining unit employees. The Board's decision in *Masters, Mates & Pilots (Marine Transport)*, 301 NLRB 526 (1991), is informative on this point. In that case, the bargaining unit consisted of licensed deck officers. The Board nevertheless found a violation of Section 8(b)(1)(A) when pickets threatened supervisors and nonemployees in the presence of unlicensed seamen, non-unit employees. I therefore conclude on the basis of the ruling in *Marine Transport* that it is sufficient that Josephs' conduct was observed or made known to statutory employees and the finding of a violation does not turn on whether or not those employees were members of the bargaining unit.

D. 8(b)(1)(A) Violations

Having found that Josephs engaged in the acts set forth above, in the presence of employees or under such circumstances that employees were likely to learn of them, the issue is whether this conduct violated Section 8(b)(1)(A) of the Act. Important to this analysis is the timing of these events.

This case involves a period of time when the Union was actively engaged in prestrike preparations. By the time of the first incident in this case on June 4, the Union had already conducted a demonstration in the human resources department, taken a membership vote to decide if informational picketing should be conducted, and served 8(g) notice of its intent to conduct informational picketing. By the time of the second set of incidents on June 16, the Union had conducted informational picketing at both the north and south sites and was in the process of conducting a strike vote. The June 18 incidents occurred the day after the strike vote was completed and the same day that Respondent served 8(g) notice of its intent to call a strike on July 1. For bargaining unit employees, this was a period of time when they were necessarily reflecting on whether they would join the prospective strike. For other statutory employees, it was a period when they were confronted with the issue of whether they should support the Union in its prospective strike by refusing to cross a picket line or by engaging in other forms of sympathizing activity. On this latter point, it is well established that nonstriking employees who refuse to cross a picket line maintained by other employees have made common cause with the strikers and are engaged in protected concerted activity, regardless of whether they are members of the picketing union or in the same collective-bargaining unit as the striking employees. *ABS Co.*, 269 NLRB 774 (1984). For all statutory employees, Section 8(b)(1)(A) and Section 7 of the Act protect the right to work. *W. T. Smith*, supra at 508, and every employee in the hospital was faced with the individual decision of whether to support Respondent's strike effort or whether to refrain from giving support. The strike deadline of July 1 was looming large and it is improbable that these incidents, occurring in the three weeks before the deadline, would have been forgotten by that time. *NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1, 7 (1st Cir. 1976) cert. denied 429 U.S. 1039 (1977). It is against this backdrop that Josephs' conduct must be viewed.

On June 4, two security guards unsuccessfully sought to prevent Josephs from entering the waiting area of the labor and delivery department and had to physically block her from entering the interior of the department. In as loud a voice as physically possible, Josephs' shouted that she could do anything she wanted and that she could not be stopped. She physically pushed past the guards in an effort to hit the buzzer to open the door. When the guards were unyielding in their attempts to stop her, Josephs verbally assaulted them with racial epithets, one reserved for each of them: she called the Latino guard a wet-back and told he should go back to Puerto Rico; the African-American guard she called a black gorilla walking in a white man's footsteps. Any employee witnessing or learning about this conduct would be impressed by Josephs' willingness to disobey a lawful directive to stay out of an immediate patient care area and to deliberately escalate a situation to the point of physical confrontation and racial slurs. Employees could reasonably anticipate that the same physical and verbal abuse might be visited upon them should they choose not to support the Union's efforts in the upcoming strike. Accordingly, I find Josephs' conduct violated Section 8(b)(1)(A).

With respect to the June 16 incident outside the cafeteria, I reject Respondent's argument that Josephs was somehow provoked to take her shirt off. The credible evidence establishes that Nelson did no more than walk toward Josephs when she removed her shirt. He did not tell her, as Respondent claims in its brief, that she could not wear the shirt outside of the cafeteria. When Nelson told her to put the shirt back on, a not unreasonable request in my view, she stated in a loud voice that she could walk around the hospital naked if she chose to and that he could not stop her. Once again, any employee witnessing or learning of Josephs' ridicule for a lawful directive by the hospital's security personnel could reasonably feel intimidated or coerced to support the Union's efforts in the upcoming strike. I therefore find that this incident violated Section 8(b)(1)(A) of the Act.

Josephs' behavior on June 16 in the emergency department, the dental department, the hallway and the lobby, should not be viewed as isolated events. This was a single ongoing confrontation as security guards followed Josephs' from department to department attempting to lawfully prevent her from entering immediate patient care areas. Their lawful efforts were met with loud exclamations that she could not be stopped, cursing, threats of physical assault, racial epithets, and sexually degrading comments. I find this conduct violated Section 8(b)(1)(A) of the Act.

As to the flag pole incident, Josephs' threat to Cyran that she would stick her foot up his ass constituted a threat of physical harm and violated Section 8(b)(1)(A).

With respect to the first incident on June 18 when Josephs' shouted that the security personnel should call the police, I do not consider this to be a violation of Section 8(b)(1)(A). This was an attention-getting device utilized by Josephs to focus employees' attention on herself. The General Counsel does not cite any cases to support its argument that a demand to call the police, no matter how loudly made, violates Section 8(b)(1)(A), and I decline to find a violation.

With respect to Josephs' threats to Passeri and to McMahon that they could be replaced in their jobs, I find that these actions, when considered in context, violated Section 8(b)(1)(A). The confrontation with Passeri began when Josephs positioned herself within 8 inches of his face and began screaming at him. As Passeri proceeded to leave the cafeteria, Josephs' physically pursued him at a quick pace. After McMahon stepped in her path, Josephs' continued her verbal assault, maintained physical contact with McMahon, reached over McMahon's shoulder, pointed her finger at Passeri, shouted his name and threatened that he could be replaced. She had the same warning for McMahon who was attempting to physically restrain her. Undoubtedly, Josephs' behavior had the singular effect of drawing the attention of many and the relevant inquiry is not whether Josephs' or Respondent was in a position to carry out these threats, but the impact these threats had on listening employees. *Electrical Workers Local 396 (Central Telephone Co.)*, 229 NLRB 469, 470 (1977). I conclude that the net effect of Josephs' conduct was the creation of an impression that Respondent would go to extreme lengths to maintain support for the strike, and I find that this impression was intimidating and coercive to employees in violation of Section 8(b)(1)(A). I further

find Josephs' several attempts to block Passeri's egress from the cafeteria by standing in front of him and forcing him to walk around her violated Section 8(b)(1)(A).

Finally, I turn to the verbal barrage directed toward McMahon. This was not an occasion of sotto voce name-calling and Respondent's reliance on *Teamsters Local 856 (Holiday Inn)*, 302 NLRB 572 (1991), is misplaced. Josephs' disgusting and sexually demeaning comments, shouted over and over again in the crowded hospital cafeteria and main lobby in the middle of the day could have had only one effect: to make employees believe that they had better support the Union's strike efforts or face similar degradation. This violates the Act.

In conclusion, the findings of unfair labor practices in this case are not based solely on Josephs' words but on her words and her conduct. The Supreme Court has noted that words can readily be so coupled with conduct as to constitute intimidation. "if a sufficient number yell any word sufficiently loudly showing an intent to ridicule, insult or annoy, no matter how innocuous the dictionary definition of that word, the effect may cease to be persuasion and become intimidation and incitement to violence." *Youngdahl v. Rainfair*, 355 U.S. 131, 138 (1957). The type of conduct engaged in by Respondent's agent in this case has been found by the Supreme Court and the Board to be inherently coercive of employees' Section 7 rights, whether engaged in by an employer or by a union. *Linn v. United Plant Guard Workers*, 383 U.S. 53, 63 (1966); *Orbit Lightspeed Courier Systems*, 323 NLRB 380, 394 (1997); *Domsey Trading Corp.*, 310 NLRB 777, 793 (1993), *enfd.* 16 F.3d 517 (2d Cir. 1994); *Romal Iron Works Corp.*, 285 NLRB 1178, 1182 (1987); *Nassau Insurance Co.*, 280 NLRB 878 (1986); *Teamsters Local 777 (Crown Metal Mfg. Co.)*, 145 NLRB 197, 204 (1963). The sum of Josephs' behavior was the conveyance of a clear message, to both unit and nonunit employees, that Respondent and its agents viewed themselves as immune to lawful direction and willing to engage in acts of verbal and physical abuse to further their agenda. This message, delivered in a period of active prestrike preparations, necessarily had the effect of restraining and coercing employees in the exercise of their Section 7 rights and violated Section 8(b)(1)(A) of the Act.

CONCLUSIONS OF LAW

1. The employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.
3. In the presence of employees and under such circumstances as to insure that employees would become aware of such acts, Respondent, by Josephs, violated Section 8(b)(1)(A) on June 4, 1998, by:
 - (a) Repeatedly shouting that she could not be stopped from entering immediate patient care areas.
 - (b) Directing racist remarks to individuals.
 - (c) Making physical contact with an individual.
4. In the presence of employees and under such circumstances as to insure that employees would become aware of such acts, Respondent, by Josephs, violated Section 8(b)(1)(A) on June 16, 1998 by:

(a) Removing her shirt and stating in a loud voice that she could walk around the hospital naked and that she could not be stopped from entering any area of the hospital.

(b) Directing racist remarks to an individual.

(c) Cursing and shouting that she could go wherever she pleased in the hospital.

(d) Threatening to physically assault individuals.

(e) Making sexually degrading remarks to individuals.

5. In the presence of employees and under such circumstances as to insure that employees would become aware of such acts, Respondent, by Josephs, violated Section 8(b)(1)(A) on June 18, 1998 by:

(a) Threatening to cause individuals to lose their jobs.

(b) Blocking an individual's egress within the Employer's premises.

(c) Making sexually degrading remarks to an individual.

6. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The General Counsel seeks a broad order on the grounds that Respondent has twice previously been adjudged to have violated Section 8(b)(1)(A) under similar circumstances. *Service Employees District 1199 (Frances Shervier Home)*, 245 NLRB 800 (1979); *Service Employees District 1199 (Southport Manor Convalescent Center)*, 227 NLRB 1732 (1977). The Charging Party points out the additional case of *Service Employees District 1199 (J.J. Jordan Geriatric)*, 312 NLRB 90 (1993). I do not view these three cases, spread out over a 22-year period, as sufficient to establish that Respondent has a proclivity for violating Section 8(b)(1)(A) of the Act and I decline to recommend a broad order. I further decline to recommend an award of attorneys' fees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, 1199, National Health & Human Service Employees Union, SEIU, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Shouting and cursing in the presence of employees that its agents cannot be stopped from entering immediate patient care areas of Staten Island University Hospital.

(b) Making racist remarks including calling individuals "Uncle Tom," "black gorilla" and "wetback who should go back to Puerto Rico" in the presence of employees when lawfully directed to stay out of immediate patient care areas.

(c) Making physical contact with individuals in the presence of employees when lawfully directed to stay out of immediate patient care areas.

(d) Removing their clothing and stating that they can walk naked around Staten Island University Hospital including in immediate patient care areas.

(e) Threatening to physically assault individuals in the presence of employees.

(f) Making sexually degrading remarks to individuals in the presence of employees.

(g) Threatening individuals with loss of their jobs in the presence of employees.

(h) Blocking individuals' egress within Staten Island University Hospital.

(i) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at all of its offices and facilities within New York, Brooklyn, Bronx, Queens, and Richmond Counties copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closes its offices, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current members and former members employed by the Staten Island University Hospital since June 4, 1998.

(b) Sign and return to the Regional Director sufficient copies of the notice for posting by Staten Island University Hospital, if willing, at all places where notices to employees are customarily posted

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 17, 1999

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT shout and curse in the presence of employees when our agents and representatives are instructed that they cannot enter immediate patient care areas.

WE WILL NOT make racist remarks in the presence of employees, including calling individuals "Uncle Tom", "black gorilla" and "wetback who should go back to Puerto Rico," when our agents and representatives are instructed that they cannot enter immediate patient care areas.

WE WILL NOT make physical contact with individuals in the presence of employees when our agents and representatives are instructed that they cannot enter immediate patient care areas.

WE WILL NOT take our clothes off and state, in the presence of employees, that our agents and representatives can walk around Staten Island University Hospital naked.

WE WILL NOT threaten to physically assault individuals in the presence of employees.

WE WILL NOT make sexually degrading remarks to individuals in the presence of employees.

WE WILL NOT threaten individuals with loss of their jobs in the presence of employees.

WE WILL NOT block individuals' egress within Staten Island University Hospital in the presence of employees.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

1199, NATIONAL HEALTH & HUMAN SERVICE EMPLOYEES
UNION, SEIU, AFL-CIO